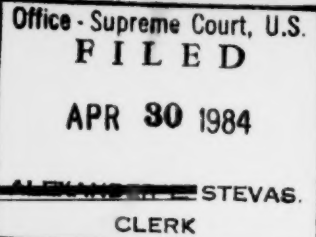


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No. 83- —

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

HARRY & BRYANT Co., *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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Andrews Mortuary, Inc.

Dated: April 30, 1984

QUESTION PRESENTED

Petitioners asked the United States Court of Appeals for the Fourth Circuit to set aside as not supported by substantial evidence in the rulemaking record a comprehensive trade regulation rule of the Federal Trade Commission which regulates the affairs of 22,000 individual funeral providers. The Court of Appeals upheld the rule, specifically holding that, "upon reviewing the whole record, we find that there is substantial evidence supporting the Commission's findings and justifying the Rule" and that "after a careful review of the whole record, we conclude that petitioners' challenges are without merit." In fact, however, the rulemaking record was not before the Court because, despite several requests by petitioners pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure, the record was never transmitted by the Federal Trade Commission.

Under these circumstances the question presented is:

Whether a United States Court of Appeals may properly uphold a trade regulation rule of the Federal Trade Commission as "supported by substantial evidence in the record taken as a whole" without having reviewed, or even received, the rulemaking record?

PARTIES

Petitioners Harry & Bryant Co., Bass-Smith Funeral Home, Inc., Thomas Shepherd & Son, Inc., Warlick Funeral Home, Inc., Jernigan-Warren Funeral Home, Inc., Frank Vogler & Sons, Inc., and Andrews Mortuary, Inc. are seven individual funeral homes who filed petitions in the United States Court of Appeals for the Fourth Circuit to review and set aside a trade regulation rule of the Federal Trade Commission ("FTC") governing the funeral industry. Respondent FTC was the respondent below.*

* Several parties who sought review of the Rule in the Court of Appeals are not parties to this petition and, pursuant to Rule 19.6 of this Court, are, as a technical matter, respondents here. These parties are: National Selected Morticians, The Greater Cincinnati Funeral Service Association and Hanes-Lineberry Funeral Service.



TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
PROCEEDINGS BELOW	6
A. Petitioners' Judicial Challenge	6
B. The Treatment of the Record	6
C. The Court of Appeals' Decision	7
REASONS WHY THE WRIT SHOULD BE GRANTED	8
A. The Court of Appeals' Failure to Review the Ad- ministrative Record Was Clearly Erroneous	9
B. The Court of Appeals' Refusal to Review the Administrative Record Raises a Question of Cen- tral Importance to the Congressional Scheme for Judicial Oversight of the Federal Administrative Process	11
CONCLUSION	13

TABLE OF AUTHORITIES

<i>Cases</i>	<i>Page</i>
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971)	9
<i>RCA v. United States</i> , 341 U.S. 412 (1951)	9
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951)	9
 <i>Statutes</i>	
5 U.S.C. § 554 (1982)	11
5 U.S.C. § 556 (1982)	11
5 U.S.C. § 557 (1982)	11
5 U.S.C. § 706 (1982)	11
15 U.S.C. § 57a (1982)	2
15 U.S.C. § 57a(a) (1) (B) (1982)	2, 8
15 U.S.C. § 57a(b) (1) (D) (1982)	1
15 U.S.C. § 57a(d) (3)	6
15 U.S.C. § 57a(e) (1) (A)	6
15 U.S.C. § 57a(e) (1) (B) (1982)	2
15 U.S.C. § 57a(e) (3) (A) (1982)	2, 9
15 U.S.C. § 57a(e) (5) (C) (1982)	2
15 U.S.C. § 2060(c) (1982)	11
15 U.S.C. § 2618(c) (1) (1982)	11
19 U.S.C. § 1516a(b) (1) (B) (1982)	11
28 U.S.C. § 1254(1) (1982)	2
28 U.S.C. § 2112 (1982)	7, 10
29 U.S.C. § 655(f) (1982)	11
29 U.S.C. § 660(a) (1982)	11
41 U.S.C. § 609(b) (Supp. V 1981)	11
 <i>Code of Federal Regulations</i>	
16 C.F.R. Part 453	<i>passim</i>
 <i>Rules</i>	
Fed. R. App. P. 1	10
Fed. R. App. P. 17	2, 3, 7, 10
 <i>Legislative Material</i>	
Legislative History of the Administrative Proce- dure Act at 279 (1946)	9

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 1107, 93rd Cong., 2d Sess. 45-46, <i>reprinted in 1979 U.S. Code Cong. & Ad. News</i> 7702	12
<i>Miscellaneous</i>	
40 Fed. Reg. 39901 (Aug. 29, 1975)	3
41 Fed. Reg. 7787 (Feb. 20, 1976)	3
47 Fed. Reg. 42260-42304 (Sept. 24, 1982)	1, 3, 4, 5



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No. 83—

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FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action on January 12, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been officially reported but appears at 1984-1 Trade Cas. (CCH) ¶ 65,805 and is reprinted in the Appendix to this petition at 1a-18a. The trade regulation rule of the Federal Trade Commission which was the subject of the proceedings before the Court of Appeals is found at 16 C.F.R. Part 453 and is reprinted in petitioners' Appendix at 23a-38a.¹

¹ The Rule was accompanied by a lengthy statement of basis and purpose which appears at 47 Fed. Reg. 42260-42304 (Sept. 24, 1982). Although the statement of basis and purpose is required by statute, 15 U.S.C. § 57a(b)(1)(D) (1982), the statute also provides that the

JURISDICTION

The decision of the Court of Appeals was entered on January 12, 1984. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on March 1, 1984. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND RULES INVOLVED

Title II of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975 ("Magnuson-Moss Act"), 15 U.S.C. § 57a (1982), constitutes the FTC's exclusive rulemaking power with respect to unfair or deceptive acts and practices and provides that the FTC "may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices."² 15 U.S.C. § 57a(a)(1)(B) (1982). In addition, the Act provides that an FTC trade regulation rule may not be sustained on judicial review unless "supported by substantial evidence in the . . . record . . . taken as a whole." 15 U.S.C. § 57a(e)(3)(A) (1982). For purposes of judicial review, the "record" includes the rule, the FTC's statement of basis and purpose, the transcript of hearings, and any written submission or other information deemed relevant by the FTC. 15 U.S.C. § 57a(e)(1)(B) (1982).

The filing of the FTC's rulemaking record with the Court is governed, *inter alia*, by Rule 17(b) of the Federal Rules of Appellate Procedure which provides that, notwithstanding a prior stipulation to file a certified list of the contents of the record in lieu of the record,

contents and adequacy of the statement of basis and purpose are not subject to judicial review. 15 U.S.C. § 57a(e)(5)(C) (1982). For the convenience of the Court, petitioners have lodged ten copies of the statement of basis and purpose with the Office of the Clerk.

² The full text of Title II of the Magnuson-Moss Act is in the Appendix at 39a-52a.

"[u]pon the request of the court or the request of a party, the record or any part thereof . . . shall be transmitted to the court. . . ." ³

STATEMENT OF THE CASE

On August 29, 1975, the FTC published a notice of proposed rulemaking concerning funeral industry practices. 40 Fed. Reg. 39901. Over 9000 separate comments were received. Following publication of the final notice of proposed rulemaking, 41 Fed. Reg. 7787 (Feb. 20, 1976), the FTC held 52 days of evidentiary hearings at which 315 witnesses presented testimony. There were 14,719 pages of transcript and an additional 4000 pages of exhibits. See 47 Fed. Reg. 42261-62 (Sept. 24, 1982).

At the hearings, opponents of the proposed Rule were precluded in a variety of ways from developing a full

³ Rule 17(b) provides in full:

Rule 17. Filing of the Record

(b) Filing—What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

and accurate record. Thus, hundreds of interested persons opposed to the proposed Rule were denied the opportunity to testify. In addition, the Presiding Officer received in evidence hundreds of complaints from consumers whose names and addresses had been masked by the FTC staff, thereby precluding opponents of the Rule from rebutting this category of evidence. Finally, following the close of the evidentiary hearings, and the expiration of the rebuttal period, the FTC staff supplemented the record without notice to interested parties by inserting over 700 additional exhibits.

On July 28, 1982, six years after the close of evidentiary hearings, the FTC by a 3-1 vote approved a final Rule. The Chairman of the FTC and the Directors of the FTC's Bureaus of Consumer Protection and Economics, the two bureaus responsible for the Rule, recommended that the Rule not be promulgated because it was not supported by substantial evidence.⁴

The Rule, which is the first federal attempt at regulating an industry that has historically been subject to extensive state and local supervision, constitutes a comprehensive code of conduct governing every provider of funeral goods and services (22,000) and every funeral transaction (2 million annually) in the United States. The FTC's avowed purpose in promulgating the Rule was to effect major changes in the way the funeral industry operates. As the Director of the FTC's Bureau of Consumer Protection stated when the rule was promulgated, the rule seeks "to alter the industry significantly." Thus, the rule:

1. Requires every funeral provider to adopt a single pricing method under which it must separately

⁴ Separate Statement of Honorable James C. Miller, III, Chairman, Federal Trade Commission, 47 Fed. Reg. 42303 (Sept. 24, 1982); Memorandum of Timothy J. Muris, July 16, 1982 (C.A. App. 1829-1866); Memorandum of Bob Tollison, July 20, 1982 (C.A. App. 1867-1871).

price and offer for sale seventeen types of individual goods and services specified by the FTC, 16 C.F.R. §§ 453.2(b)(2)-(4) (26a-30a);

2. Requires every funeral provider affirmatively to disclose detailed price information over the telephone in response to requests, 16 C.F.R. § 453.2(b)(1) (26a);
3. Requires every funeral provider to make twelve detailed, affirmative written statements to consumers with no variation from the specific language mandated by the FTC, 16 C.F.R. §§ 453.3(a)(2)(ii); 453.2(b)(4)(i)(D); 453.2(b)(4)(iii)(A)(1); 453.2(b)(4)(iii)(B)(1); 453.2(b)(4)(iii)(C)(1); 453.2(b)(4)(iii)(C)(2); 453.3(b)(2); 453.3(c)(2); 453.3(f)(2); 453.4(b)(2)(A); 453.4(b)(2)(B); 453.5(b) (26a-36a); and
4. Requires every funeral provider that arranges direct cremations to provide an "unfinished wood box" or alternative container to consumers. 16 C.F.R. § 453.4(a)(2). (35a.)

The apparent evidentiary basis for a Rule of such breadth is a collection of over 70 methodologically flawed "surveys" and the anecdotal testimony of various individual witnesses. Because the "surveys" were not conducted in accordance with accepted principles of survey research, they suffered from numerous admitted methodological deficiencies which rendered them unreliable and incapable of generalization to the industry as a whole. 47 Fed. Reg. 42269 n. 98 (Sept. 24, 1982). As the Director of the Bureau of Consumer Protection stated: "In general, no survey or combination of surveys support the rule as a whole, or any of its major components." (C.A. App. 1833.) Similarly, the non-survey evidence adduced in support of the Rule consisted largely of the testimony or unexamined comments of individual consumers which were vague, ambiguous, biased or based on hearsay and which, at best, were so limited in their reference as

to constitute an insufficient evidentiary basis "to support a nationwide, industry-wide regulation, particularly one such as this that is intended to work a dramatic change in the way the industry works." (C.A. App. 1833-84.)

PROCEEDINGS BELOW

A. Petitioners' Judicial Challenge

In view of the inadequacy of the record and the severity of penalties for violating this lengthy and complicated Rule,⁵ petitioners filed timely petitions in the United States Court of Appeals for the Fourth Circuit seeking review of the Rule.⁶ 15 U.S.C. § 57a(e)(1)(A) (1982). Petitioners argued that the rule and its various provisions were not supported by substantial evidence in the record taken as a whole. Petitioners' evidentiary arguments were wide-ranging and detailed. Petitioners demonstrated the pervasive flaws in the general quality of the record evidence claimed to support the Rule. They also challenged the substantiality of the specific evidence alleged to support the basic factual conclusions and assumptions on which the Rule was based. Finally, petitioners challenged the adequacy of the record evidence claimed to support the individual provisions of the Rule.

B. The Treatment of the Record

Petitioners and the FTC initially agreed to file a certified index of the record with the Court of Appeals in lieu of transmitting the full record. However, in order to permit the Court to evaluate the inadequacy of the

⁵ Violations of the Rule are punishable by a penalty of up to \$10,000 for each violation or day of violation. 15 U.S.C. § 57a(d)(3) (1982).

⁶ Similar petitions filed in other Courts of Appeals were consolidated in the Court of Appeals for the Fourth Circuit for uniform disposition. Accordingly, if not set aside, the decision below represents a final affirmance of the Rule for the entire funeral industry.

evidentiary record, petitioners requested the FTC, pursuant to Rule 17(b) of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2112 (1982), to transmit the record to the court prior to oral argument. (53a-54a.) Although the FTC was agreeable (55a-56a and 59a-60a), the Court of Appeals directed that the record remain at the FTC until oral argument but that counsel could then ask the court "to require transmission of the entire record or specific parts thereof to the court." (57a-58a.) Following oral argument, counsel for petitioners requested that the Court of Appeals direct the transmission of the entire record to the court. (61a.) There was no objection by any other party. To the best of petitioners' ability to determine, the court never directed the FTC to transmit the record for review, and the record was not before the court during the panel's deliberations.⁷

C. The Court of Appeals' Decision

On January 12, 1984, a panel of the Court of Appeals affirmed the Rule. Although the administrative record was not before the court, the panel ruled that each of the provisions of the Rule was supported by substantial evidence in the record. (13a-16a.) The panel concluded that, "[u]pon reviewing the whole record, we find that there is substantial evidence supporting the Commission's findings and justifying the Rule. . ." (16a) and that "after a careful review of the whole record, we conclude that petitioners' challenges to the Funeral Rule are without merit."⁸ (18a.)

⁷ The Docket Sheet of the Court of Appeals, a certified copy of which has been lodged with the Clerk of the Court, indicates that no part of the administrative record was transmitted to the Court of Appeals.

⁸ In one scant paragraph, the panel also concluded that the FTC acted within the scope of its authority when it promulgated the

In timely fashion, petitioners sought a rehearing urging, among other things, that the panel could not properly affirm the Rule as supported by substantial evidence in the record without having the record before it. Petitioners' request for a rehearing was denied, without explanation, on March 1, 1984. (19a-22a.)

REASONS WHY THE WRIT SHOULD BE GRANTED

This Court should grant the petition and reverse the judgment of the Court of Appeals because, in failing to review the rulemaking record, the Court of Appeals so far departed from the usual course of judicial procedure that it was unable to, and did not, perform the critical function of reviewing the substantiality of evidence in support of the challenged Rule.

The failure of the Court of Appeals to review the record presents a question of exceptional importance concerning the proper role of federal courts in reviewing the actions of federal administrative agencies. A host of federal statutes, including the Administrative Procedure Act, provide for judicial review of a wide range of administrative action under a substantial evidence standard. If courts charged by Congress with the responsibility to review administrative action under this standard are free to ignore the agency record, judicial review of administrative action will cease to be effective and parties subject to such administrative action will be deprived of the protection of judicial review contemplated by Congress.

rule because the rule technically conformed to the requirements of Section 18 of the Magnuson-Moss Warranty-FTC Improvements Act, 15 U.S.C. § 57a(a)(1)(B) (1982), which permits the FTC to prescribe "rules which define with specificity acts or practices which are unfair" and "requirements prescribed for the purpose of preventing such acts. . . ." (12a.)

A. The Court of Appeals' Failure to Review the Administrative Record Was Clearly Erroneous

The Magnuson-Moss Act provides that an FTC trade regulation rule may not be sustained on appeal unless it is supported "by substantial evidence in the . . . record . . . taken as a whole." 15 U.S.C. § 57a(e)(3)(A) (1982). Petitioners vigorously challenged the substantiality of the record evidence in support of the Rule. Just as vigorously, respondent Federal Trade Commission defended the substantiality of that evidence.

By not having the administrative record before it, the Court of Appeals was unable to perform its proper reviewing function which required it to examine the evidence in the record. In determining whether a rule is supported by substantial evidence in the record, a court must not only examine the evidence in support of the rule but also the evidence which fairly detracts from it. As the Supreme Court has stated, "[t]his is clearly the significance of the [statutory] requirement . . . that courts consider the whole record." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). In reviewing the record, the court must engage in a substantial inquiry into the facts, one that is "searching and careful." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 at 415, 416 (1971). Clearly, actual review of the evidence in the record is the essence of the Court of Appeals' function when, as here, an administrative action is challenged as not supported by substantial evidence in the record.⁹ *RCA v. United States*, 341 U.S. 412, 414-15 (1951).

⁹ As the House Judiciary Committee stated in describing the provision of the Administrative Procedure Act, 5 U.S.C. § 706 (2)(E) (1982) which requires that certain agency action must be supported by substantial evidence: "In reviewing a case under this fifth category the court must base its judgment upon its own review of the entire record or so much thereof as may be cited by any party." Legislative History of the Administrative Procedure Act at 279 (1946).

Petitioners have the right—and the Court of Appeals has the duty—to have the administrative record before the court. The Federal Rules of Appellate Procedure, promulgated by Order of this Court, Order of December 4, 1967, govern “proceedings in the courts of appeals for review or enforcement of orders of administrative agencies. . . .” Fed. R. App. P. 1. Rule 17 of the Rules of Appellate Procedure applies to the filing of the record with the Court of Appeals in connection with petitions to review administrative action and provides that the agency “shall file the record with the clerk of the court of appeals. . . .” Fed. R. App. P. 17(a). The agency has the option of “filing the entire record” or “such part” of the record as the parties may designate by stipulation, or, instead, a certified list of the contents of the record. Fed. R. App. P. 17(b). If, as was the case here, the parties elect to file a certified list of the contents of the record, the Rule provides that “upon request of the court or *the request* of a party, the record or any part thereof thus retained [at the agency] shall be transmitted to the court notwithstanding any prior stipulation.” *Id.* (emphasis added). *See also* 28 U.S.C. § 2112 (1982).

Here, petitioners twice asked that the record be transmitted to the court. The FTC did not object and took the necessary steps to have the record duplicated for transmission to the court. Contrary to the requirements of Rule 17(b), however, the court directed the FTC to retain the entire record and, to the best of petitioners’ ability to determine, never requested, reviewed or consulted the record before issuing its decision concluding that the FTC’s challenged Rule was supported by substantial evidence in the record.

Because the error of the Court of Appeals is so clear and because it goes to the core of the Court’s decision that the Rule was supported by substantial evidence, summary reversal is appropriate.

B. The Court of Appeals' Refusal to Review the Administrative Record Raises a Question of Central Importance to the Congressional Scheme for Judicial Oversight of the Federal Administrative Process

The Court of Appeals' drastic departure from accepted judicial practice and procedure strikes at the heart of Congress' express statutory scheme to control and oversee much of the federal administrative process. Congress has determined that a wide variety of the rulings, orders and decisions of federal administrative agencies are valid only if supported by substantial evidence in the record. Over 100 provisions of the United States Code currently provide for judicial review of administrative action under a substantial evidence standard.¹⁰

Although a complete analysis of these statutes is not possible here, there can be no doubt as to the importance

¹⁰ A complete list of these provisions is set forth in the Appendix at 62a-69a. A representative sample of actions or determinations of federal administrative agencies which Congress has made subject to substantial evidence scrutiny by the courts includes:

- All administrative rulemakings governed by the procedures of 5 U.S.C. §§ 556 and 557, *see* 5 U.S.C. § 706 (1982);
- All final orders in agency adjudicative proceedings under 5 U.S.C. § 554, *see* 5 U.S.C. § 706 (1982);
- Safety rules of the Consumer Products Safety Commission, 15 U.S.C. § 2060(c) (1982);
- Regulations and testing rules for toxic substances issued by the Environmental Protection Agency, *see* 15 U.S.C. § 2618 (c) (1) (1982);
- Antidumping and countervailing duty orders of the Department of Commerce and related determinations of injury by the International Trade Commission, *see* 19 U.S.C. § 1516a (b) (1) (B) (1982);
- Occupational health and safety standards and enforcement orders issued by the Department of Labor, *see* 29 U.S.C. §§ 655(f) and 660(a) (1982);
- Determinations of agency boards of contract appeals, *see* 41 U.S.C. § 609(b) (Supp. V 1981).

of substantial evidence review to the overall Congressional scheme for judicial supervision of administrative activity. For example, in enacting the Magnuson-Moss Act under which the FTC promulgated the Funeral Rule, Congress recognized the potential breadth of the FTC's substantive rulemaking power and imposed additional procedural requirements and stricter judicial review provisions than would otherwise have been available under the Administrative Procedure Act. Clearly, Congress envisioned a significant supervisory role for courts of appeal sitting to review FTC trade regulation rules under the substantial evidence standard.¹¹ The same could be said for each of the other statutes which provide for substantial evidence review of administrative action.

Although it is not possible to quantify with precision the actual number of administrative orders, rules or decisions which Congress has made subject to judicial review on a substantial evidence basis, it is plainly large.¹²

¹¹ Commenting on existing procedures, the House of Representatives stated:

Your committee believes these rulemaking procedures and this scope of judicial review may be inadequate in some cases where fundamental factual premises of a rule are at issue. Because of the potentially persuasive and deep effect of rules defining what constitutes unfair or deceptive acts or practices and the broad standards which are set by the words "unfair or deceptive acts or practices," the committee believes greater safeguards are necessary. Accordingly, it has fashioned the rulemaking procedures and judicial review provisions described . . . which we believe to be more appropriate in this context. . . .

H.R. Rep. No. 1107, 93d Cong., 2d Sess. 45-46, *reprinted in* 1974 U.S. Code Cong. & Ad. News 7702, 7727. The House Committee Report went on to state that a challenged "rule would not be affirmed by the Court unless the Commission's action was supported by substantial evidence in the record taken as a whole." *Id.* at 48.

¹² Of course, this does not begin to include the equally diverse and extensive range of administrative action that is subject to

If, as happened here, a Court of Appeals reviewing administrative action under this standard is free to disregard the record, the entire Congressional plan to oversee and place limits upon the action of federal administrative agencies would be placed in jeopardy.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: April 30, 1984

judicial review on a "supported by evidence in the record" test. Such review also requires that the court have the record before it in order to properly discharge its reviewing function.